

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Towerstream Corporation	)	File No.: EB-FIELDSCR-12-00004030
	)	NAL/Acct. No.: 201232600017
Licensee of Fixed Earth Stations	)	FRN: 0015467749
KA407 and KA412,	)	
Miami, Florida	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER**

Adopted: September 26, 2012

Released: September 26, 2012

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that Towerstream Corporation (Towerstream), licensee of co-located Fixed Earth Stations, KA407 and KA412, in Miami, Florida, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended (Act),<sup>1</sup> and Section 25.102(a) of the Commission's rules (Rules),<sup>2</sup> by operating a fixed earth station in Miami, Florida without the requisite Commission authorization. We conclude that Towerstream is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). In addition, we direct Towerstream to submit, no later than thirty (30) calendar days from the date of this NAL, a statement signed under penalty of perjury stating that it is in compliance with the Commission's satellite communications requirements.

**II. BACKGROUND**

2. Towerstream is authorized to operate fixed earth stations under Call Signs KA407 and KA412 using antennas measuring 15.5 meters in diameter and 9.3 meters in diameter at 4045 NW 97<sup>th</sup> Ave., Miami, Florida.<sup>3</sup> On October 4, October 6, and November 10, 2011, agents from the Enforcement Bureau's Miami Office (Miami Office) determined that transmissions on the frequency 6381.9 MHz were emanating from a third (but smaller) antenna located at 4045 NW 97<sup>th</sup> Ave., Miami, Florida.

3. On November 10, 2011, agents from the Miami Office contacted Towerstream's vice president of engineering and operations and arranged to inspect Fixed Earth Stations KA407 and KA412 later that day with one of Towerstream's engineers. The Towerstream engineer confirmed that it was using an antenna measuring 3.8 meters in diameter. The Commission's records, however, do not reflect any authorization being granted to Towerstream to operate its earth stations with an antenna measuring 3.8 meters in diameter.

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<sup>1</sup> 47 U.S.C. § 301.

<sup>2</sup> 47 C.F.R. § 25.102(a).

<sup>3</sup> See License File No. SES-RWL-20040305-00317 (KA407); and License File No. SES-RWL-20040422-00574 (KA412).

### III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.<sup>4</sup> Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>5</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>6</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>7</sup> The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.<sup>8</sup> The term “repeated” means the commission or omission of such act more than once or for more than one day.<sup>9</sup>

#### A. Unlicensed Operations

5. The evidence in this case is sufficient to establish that Towerstream violated Section 301 of the Act and Section 25.102(a) of the Rules. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license granted under the provisions of the Act.<sup>10</sup> Section 25.102(a) of the Rules states that “[n]o person shall use or operate apparatus for the transmission of energy or communications or signals by space or earth stations except under, and in accordance with, an appropriate authorization granted by the Federal Communications Commission.”<sup>11</sup> According to the Commission’s records, Towerstream is authorized to operate fixed earth stations under Call Signs KA407 and KA412 using antennas measuring 15.5 meters in diameter and 9.3 meters in diameter at 4045 NW 97<sup>th</sup> Ave., Miami, Florida.<sup>12</sup> On October 4, October 6, and November 10, 2011, agents from the Miami Office observed transmissions emanating on the frequency 6381.9 MHz from an unauthorized antenna, measuring 3.8 meters in diameter, that a Towerstream engineer confirmed was in operation. The

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<sup>4</sup> 47 U.S.C. § 503(b).

<sup>5</sup> 47 U.S.C. § 312(f)(1).

<sup>6</sup> H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) . . . . As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

<sup>7</sup> See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

<sup>8</sup> See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

<sup>9</sup> Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

<sup>10</sup> 47 U.S.C. § 301.

<sup>11</sup> 47 C.F.R. § 25.102(a).

<sup>12</sup> See *supra* note 3.

Commission, however, has no record that Towerstream ever submitted any application<sup>13</sup> to modify its licenses to authorize operation of a fixed earth station using a 3.8 meter antenna at this location. Accordingly, Towerstream's use of an unauthorized antenna was outside of the scope of its license authorizations. Based on the evidence before us, we find that Towerstream apparently willfully and repeatedly violated Section 301 of the Act and Section 25.102(a) of the Rules by operating a fixed earth station without appropriate authorization granted by the Commission.

#### B. Proposed Forfeiture Amount and Reporting Requirement

6. Pursuant to the Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization for the service is \$10,000.<sup>14</sup> In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>15</sup> Because Towerstream is a multi-million dollar business,<sup>16</sup> a forfeiture above the base forfeiture amount is necessary to ensure that it serves as an effective deterrent (and not simply a cost of doing business) against Towerstream's future noncompliance with the Commission's satellite communications requirements.<sup>17</sup> Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Towerstream is apparently liable for a total forfeiture in the amount of \$15,000.

7. We also direct Towerstream to submit a written statement, pursuant to Section 1.16 of the Rules,<sup>18</sup> signed under penalty of perjury by an officer or director of Towerstream, stating that its operation of Fixed Earth Stations KA407 and KA412 are in full compliance with the Rules and with the terms of its authorizations. This statement must be provided to the Miami Office at the address listed in paragraph 10, below, within thirty (30) calendar days of the release date of this NAL.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Towerstream Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A**

<sup>13</sup> See 47 C.F.R. §§ 25.117, 25.130 (requiring licensees to submit applications to modify the terms of their licenses on FCC Form 312 and prohibiting licensees from making any such modifications prior to application grant).

<sup>14</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), recons. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. 1.80.

<sup>15</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>16</sup> In 2011, Towerstream Corporation reported \$26.495 million in annual revenues. <http://finance.yahoo.com/q/is?s=TWER+Income+Statement&annual> (last visited Aug. 29, 2012).

<sup>17</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100, para. 24 (stating need to take into account a violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business). See, e.g., *Tesla Exploration, Inc.*, EB-11-PA-0153, Notice of Apparent Liability for Forfeiture, FCC 12-88, 2012 WL 3195376, at \*3, para. 10 (Aug. 3, 2012) (upwardly adjusting proposed forfeiture due to violator's ability to pay); *Time Warner Entertainment-Advance/Newhouse Partnership*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 8047, 8049, para. 6 (Enf. Bur. 2012) (same).

<sup>18</sup> 47 C.F.R. § 1.16.

**FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Section 301 of the Act and Section 25.102(a) of the Commission's rules.<sup>19</sup>

9. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Towerstream Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. **IT IS FURTHER ORDERED** that Towerstream Corporation **SHALL SUBMIT** a statement as described in paragraph 7, above, to the Miami Office within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. The statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617. Towerstream Corporation shall also e-mail the written statement to [SCR-Response@fcc.gov](mailto:SCR-Response@fcc.gov).

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Towerstream Corporation shall also send electronic notification on the date said payment is made to [SCR-Response@fcc.gov](mailto:SCR-Response@fcc.gov). Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>20</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>21</sup> If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant

<sup>19</sup> 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 25.102(a).

<sup>20</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>21</sup> See 47 C.F.R. § 1.1914.

to Sections 1.16 and 1.80(f)(3) of the Rules.<sup>22</sup> Mail the written statement to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617 and include the NAL/Acct. No. referenced in the caption. Towerstream Corporation also shall e-mail the written response to [SCR-Response@fcc.gov](mailto:SCR-Response@fcc.gov).

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and First Class Mail to Towerstream Corporation at Tech II, 55 Hammarlund Way, Middletown, RI 02842.

FEDERAL COMMUNICATIONS COMMISSION

Stephanie Dabkowski  
Resident Agent  
Miami Office  
South Central Region  
Enforcement Bureau

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<sup>22</sup> 47 C.F.R. §§ 1.16, 1.80(f)(3).